

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

In re AMERICAN REALTY CAPITAL
PROPERTIES, INC. LITIGATION

Civil Action No. 1:15-mc-00040-AKH

ETON PARK FUND, L.P. and
ETON PARK MASTER FUND, LTD.,

Plaintiffs,

v.

AMERICAN REALTY CAPITAL PROPERTIES,
INC. (n/k/a VEREIT, INC.), et al.,

Defendants.

Civil Action No. 1:16-cv-09393-AKH

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT LISA P. MCALISTER'S
MOTION TO DISMISS THE COMPLAINT**

Defendant Lisa P. McAlister ("Ms. McAlister"), by and through her counsel, respectfully submits this memorandum of law in support of her motion to dismiss with prejudice Plaintiffs' Complaint pursuant to Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure.

The Complaint asserts two claims against Ms. McAlister: a claim under Section 10(b) of the Securities Exchange Act of 1934 (Count IV) and a New York state common law fraud claim (Count VI). Compl. ¶¶ 207, 225 (ECF No. 1). Following this Court's guidance and preference not to receive excessive or duplicative pleadings, Ms. McAlister is providing a limited brief for the purpose of identifying certain legal arguments that have been raised by other defendants and that also warrant dismissal of the claims against Ms. McAlister.

As set forth in the Memorandum of Law accompanying the Motion to Dismiss filed today by Defendants AR Capital, LLC, Nicholas S. Schorsch, Edward M. Weil, Peter M. Budko, and William K. Kahane (ECF No. 49), the Section 10(b) claim should be dismissed as time-barred to

the extent it arises out of Plaintiffs' transactions in security-based swap agreements. In addition, the Section 10(b) and New York state law fraud claims should be dismissed in their entirety for the independent reason that the Complaint fails to allege Plaintiffs' transactions in American Realty Capital Properties, Inc. common stock and swaps with particularity, as required by Rule 9(b).¹

The legal reasoning in Defendants AR Capital, LLC, Nicholas S. Schorsch, Edward M. Weil, Peter M. Budko, and William K. Kahane's Memorandum of Law is sound and should be adopted by the Court in support of its dismissal of Counts IV and VI—the only claims asserted against Ms. McAlister in the Complaint. However, Ms. McAlister does not accept or adopt any of the factual characterizations, statements, or descriptions set forth in the Complaint or contained in that memorandum.

CONCLUSION

For the foregoing reasons, Ms. McAlister respectfully requests that Plaintiffs' Complaint be dismissed in its entirety and with prejudice as to Ms. McAlister.

¹ The Complaint also fails to state a claim for the reasons stated in Ms. McAlister's motion to dismiss filed on May 29, 2015 in *In re American Realty Capital Properties, Inc. Litigation*, No. 15-mc-40 (AKH) (S.D.N.Y.) (the "Class Action"). Ms. McAlister respectfully acknowledges that the Court resolved those contentions adversely in its November 6, 2015 order, *see* Class Action ECF No. 167, and notes them now only to preserve them for reconsideration or appeal.

Dated: February 10, 2017

Respectfully submitted,

ZUCKERMAN SPAEDER LLP

By: /s/ Shawn P. Naunton

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